

(6)
No. 86-684

Supreme Court, U.S.
FILED

SEP 12 1987

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1986

— o —
THE STATE OF CALIFORNIA,

Petitioner,

vs.

BILLY GREENWOOD AND DYANNE VAN HOUTEN,

Respondents.

— o —
On Writ of Certiorari To The
Court of Appeal of California,
Fourth Appellate District, Division Three

— o —
BRIEF FOR RESPONDENT DYANNE VAN HOUTEN

— o —
RICHARD L. SCHWARTZBERG
401 Civic Center Drive West
Suite 820
Santa Ana, California 92701
714-835-3339

*Counsel for Respondent
Dyanne Van Houten*

COCKLE LAW BRIEF PRINTING CO., (800) 223-6964
or call collect (402) 342-2831

BEST AVAILABLE COPY 137/PP

QUESTIONS PRESENTED*

Twice the California Supreme Court concluded that trash left at curbside is protected under the Fourth Amendment from the federal Constitution's proscription against unreasonable searches and seizures. Where police lacked probable cause or any reasonable suspicion Billy Greenwood had committed a crime, eschewed any attempts to obtain a search warrant, could point to no exemption to the warrant requirement, and yet repeatedly searched Billy Greenwood's trash, did the court of appeal err in concluding that the search and subsequent seizure violated Billy Greenwood's and Dyanne Van Houten's reasonable expectation of privacy? As a matter of public policy, should the Court conclude individuals have a right to expect that police will not conduct warrantless and unsupported excursions into their trash and that such expectations are both reasonable and legitimate? Should police be required to possess probable cause to believe an individual's trash left at curbside contains evidence of a crime before conducting a warrantless search?

*All parties to the proceeding in the California Court of Appeal, Fourth Appellate District are listed in the caption.

TABLE OF CONTENTS

	Page(s)
Questions Presented	i
Table of Authorities	iv
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Summary of Argument	5
Argument	10
I. THE MERE FACT AN INDIVIDUAL PLACES TRASH AT CURBSIDE FOR PICK- UP DOES NOT DETERMINE HIS REASON- ABLE EXPECTATION OF PRIVACY UN- DER THE FOURTH AMENDMENT	10
A. Property Law Concepts Are Irrelevant For Determining A Defendant's Reasonable Ex- pectation Of Privacy	10
B. The Use Of Property Law Concepts To Re- solve Whether An Individual Has A Le- gitimate Expectation Of Privacy Fails To Account For Changes In Technology And Personal Values	12
C. Although The Great Weight Of Authority Finds Garbage Searches To Fall Outside The Fourth Amendment, They Uniformly Err In Basing Their Conclusion Upon Abandonment Principles	14
II. THE WARRANTLESS AND UNSUPPORT- ED SEARCH OF BILLY GREENWOOD'S GARBAGE VIOLATED DYANNE VAN HOU- TEN'S REASONABLE EXPECTATION OF PRIVACY MANDATING SUPPRESSION OF THE FRUITS OF THAT SEARCH	14

TABLE OF CONTENTS—Continued

	Page(s)
A. Billy Greenwood's Decision To Place His Trash At Curbside For Collection Met The Subjectivity Component Of Katz v. United States	14
B. Possession Of An Expectation Of Privacy In Garbage Left For Collection Is Both Reasonable And Legitimate	18
III. THE COURT MUST AT THE VERY LEAST ADOPT A RULE REQUIRING THE POLICE HAVE PROBABLE CAUSE PRIOR TO CONDUCTING WARRANTLESS SEARCHES OF TRASH LEFT AT CURBSIDE	24
A. United States v. Ross Establishes A Middle Ground Where An Individual Has A Legitimate But Lowered Expectation Of Privacy...	24
B. The Court Should Adopt A Rule Governing Trash Services That Where An Individual Has Exhibited A Reasonable Expectation Of Privacy In Trash Police May Conduct Warrantless Searches Only Upon Probable Cause	25
C. The Search Of Billy Greenwood's Trash Was Without Probable Cause Mandating The Quashing Of The Search Warrant For His Home	27
Conclusion	28

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Abel v. United States</i> , 362 U.S. 217 (1960)	11, 21
<i>Arkansas v. Sanders</i> , 442 U.S. 753 (1979)	24
<i>California v. Ciraolo</i> , 476 U.S. —, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986)	11
<i>California v. Krivda</i> , 409 U.S. 33 (1972)	5, 21
<i>California v. Krivda</i> , 412 U.S. 919 (1973)	5, 21
<i>California v. Rooney</i> , — U.S. —, 107 S.Ct. 2852, 97 L.Ed.2d 258 (1987)	11, 15
<i>Carroll v. United States</i> , 267 U.S. 132 (1925)	24, 25
<i>Delaware v. Prouse</i> , 440 U.S. 648 (1979)	19
<i>Ex Parte Jackson</i> , 96 U.S. 727 (1878)	13
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983)	27, 28
<i>In re Lance W.</i> , 37 Cal. 3d 873 (1985)	15
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	5, 8, 11, 14, 15, 16, 19
<i>Magda v. Bensen</i> , 536 F.2d 111 (6th Cir. 1976)	10
<i>Oliver v. United States</i> , 466 U.S. 170 (1984)	11, 19
<i>People v. Edwards</i> , 71 Cal. 2d 1096 (1969)	7, 20, 21
<i>People v. Greenwood</i> , 182 Cal. App. 3d 729 (1986)	5
<i>People v. Huddleston</i> , 38 Ill.App.3d 277, 347 N.E. 2d 76 (1980)	10, 21
<i>People v. Krivda</i> , 5 Cal. 3d 357 (1971)	5, 7, 21
<i>People v. Krivda</i> , 8 Cal. 3d 623 (1973)	5, 13, 21
<i>People v. Whotte</i> , 113 Mich.App. 12, 317 N.W.2d 266 (1982)	21, 22
<i>Robbins v. California</i> , 453 U.S. 420 (1984)	24

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Smith v. Maryland</i> , 442 U.S. 735 (1979)	12, 17
<i>Smith v. State</i> , 510 P.2d 793 (Alas. 1973)	6, 10, 21, 23
<i>South Dakota v. Opperman</i> , 428 U.S. 364 (1976)	25
<i>State v. Brown</i> , 20 Ohio App.3d 36, 484 N.E.2d 215 (1984)	10
<i>State v. Chapman</i> , 250 A.2d 203 (Supp.Jud.Ct.Me. 1969)	21
<i>State v. Johnson</i> , 413 A.2d 931 (Sup.Jud.Ct.Me. 1980)	21
<i>State v. Olquist</i> , 327 N.W.2d 587 (Minn. 1982).....	16, 20
<i>State v. Purvis</i> , 249 Or. 404, 438 P. 2d 1002 (1968).....	10
<i>State v. Schultz</i> , 388 So.2d 1326 (Fla.App. 1980).....	10, 22
<i>State v. Stevens</i> , 123 Wisc.2d 303, 367 N.W.2d 788 (1985)	10, 22
<i>State v. Tanaka</i> , 701 P.2d 1274 (Hawaii 1985)	21, 27
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	27
<i>United States v. Biondich</i> , 652 F.2d 743 (8th Cir. 1981)	9, 20
<i>United States v. Burnette</i> , 698 F.2d 1038 (9th Cir. 1983)	10, 12
<i>United States v. Chadwick</i> , 433 U.S. 1 (1977)	9, 24
<i>United States v. Crowell</i> , 586 F.2d 1020 (4th Cir. 1978)	9, 20
<i>United States v. Dela Espriella</i> , 781 F.2d 1432 (9th Cir. 1986)	10
<i>United States v. Dunn</i> , — U.S. —, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987)	11, 13, 20
<i>United States v. Dzialak</i> , 441 F.2d 212 (2nd Cir. 1971)	10

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>United States v. Jacobsen</i> , 466 U.S. 109 (1984)	5, 13
<i>United States v. Kahan</i> , 350 F.Supp. 784 (S.D. N.Y. 1972)	8, 22
<i>United States v. Minker</i> , 312 F.2d 632 (3rd Cir. 1963)	10
<i>United States v. Mustone</i> , 469 F.2d 970 (1st Cir. 1972)	10
<i>United States v. Reichert</i> , 647 F.2d 397 (3rd Cir. 1981)	10, 17
<i>United States v. Ross</i> , 456 U.S. 798 (1982)	24, 25, 27
<i>United States v. Shelby</i> , 573 F.2d 971 (7th Cir. 1978)	10
<i>United States v. Sumpter</i> , 669 F.2d 1215 (8th Cir. 1982)	20
<i>United States v. Terry</i> , 702 F.2d 299 (2nd Cir. 1983)	9, 10, 16, 20
<i>United States v. Vahalik</i> , 606 F.2d 99 (5th Cir. 1979)	9
<i>United States v. Van Leeuwen</i> , 397 U.S. 249 (1970)	13

CONSTITUTION

Cal. Const. art. 1, § 28	2, 15
U.S. Const. amend. IV	passim

STATUTES

Orange County Municipal Code § 3-3-85	18
Orange County Municipal Code § 4-3-45	18
West Cal. Ann. Penal Code § 739	4

TABLE OF AUTHORITIES—Continued

	Page(s)
West Cal. Ann. Penal Code § 995	4
West Cal. Ann. Penal Code § 1538.5	2
West Cal. Ann. Penal Code § 11350	2
West Cal. Ann. Penal Code § 11351	2

RULES OF COURT

Rules of the U.S. Supreme Court, Rule 21	15
--	----

OTHER

LaFave, W., Search and Seizure 2d (1978)	8, 19, 27
Note, 60 N.Y.U.L. Rev. 725 (1985)	15
Orwell, G., 1984 (1983 Ed.)	6



No. 86-684

**In The
Supreme Court of the United States**
October Term, 1988

THE STATE OF CALIFORNIA,
Petitioner,
vs.

BILLY GREENWOOD AND DYANNE VAN HOUTEN,
Respondents.

**On Writ of Certiorari To The
Court of Appeal of California,
Fourth Appellate District, Division Three**

BRIEF FOR RESPONDENT DYANNE VAN HOUTEN

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

Fourth Amendment of the United States Constitution,
tion,

The right of the people to be secure in their persons,
houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

California Constitution Article 1, § 28, subdivision (d),
Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. . . .

o

STATEMENT OF THE CASE

In a complaint filed July 30, 1984, respondent Dyanne Van Houten was alternatively charged by the Orange County District Attorney with simple possession of cocaine and possession of cocaine for purposes of sale.¹ R. 1.² A preliminary examination was conducted before a magistrate on October 2, 3 and 4, 1984. R. 7-249. Concurrent with the preliminary examination the magistrate heard respondent's joint motion to suppress evidence.³

¹West Cal. Ann. Penal Code §§ 11350, 11351.

²The record is referenced to the clerk's transcript on appeal.

³West Cal. Ann. Penal Code § 1538.5 (1982) provided that, "[a] defendant may move for return of property or to suppress as evidence against him any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds: (1) The search or seizure without a warrant was unreasonable. (2) The search or seizure with a warrant was unreasonable because (f) [i]f the property or evidence relates to a felony offense initiated by complaint, the motion

(Continued on following page)

The sole evidence admitted against respondents was the product of a search warrant served on respondent Greenwood's residence. At the preliminary examination, Jenny Stracner testified she was a narcotics investigator for the City of Laguna Beach. R. 129. In February based upon information received from an anonymous informant, she began a practice of monitoring the trash at Billy Greenwood's residence. R. 113. She would ask the trash collectors to pick up the trash at Greenwood's residence, keep it separate from all other trash in the truck, and bring it down the street where she would wait. R. 129.

The trash was brought in a segregated area of the trash truck in a dark trash bag tied at the top. R. 102. There was no evidence any contraband or contents could be seen without opening the bag. Inside the bags officer Stracner found items she believed indicated drug use: bindles with residue, straws with residue, and baggies with residue. R. 91.

Based upon these findings, she sought and obtained a search warrant for 1575 Fayette, Laguna Beach. J.A. 27. On April 6, 1984, she and other police officers executed the search warrant on the house.⁴ J.A. 43.

During the search of respondent Greenwood's house, officer Richard Seapin went upstairs to search additional

(Continued from previous page)

may be made in the municipal or justice court at the preliminary examination."

Effective January 1, 1987, the procedures contained in subdivision (f) were radically modified but do not affect the present proceedings.

⁴There was a subsequent search based upon a second search warrant. However, only the first search involved Ms. Van Houten.

rooms. R. 160. On the floor he observed a purse. Officer Seapin opened the purse and looked inside seeing a sheet of magazine, crumpled up. R. 161. Seapin removed the paper from the purse, opened it and found white powder which he turned over to officer Stracner. R. 161-162.

The purse contained an identification card with Dyanne Van Houten's name and picture. R. 163. When officer Jimenez went downstairs with the purse and asked whose it was, Dyanne Van Houten claimed it. R. 175. Van Houten was then arrested. R. 70. The white powder was determined to be cocaine. R. 61.

The magistrate denied Van Houten's motion to suppress evidence and held her to answer solely upon the possession charge. J.A. 9. Nine days later petitioner filed an information charging the identical criminal counts as alleged in the complaint.⁵ J.A. 10. On February 1, 1985, a motion to dismiss was heard in the superior court based upon the magistrate's denial of the motion to suppress evidence.⁶ The motion to set aside the information was granted and the charges were dismissed. J.A. 75.

⁵West Cal. Ann. Penal Code § 739 (1985) permits the filing of an information based upon the evidence presented to the magistrate notwithstanding the magistrate's order discharging a defendant on a selected count. A defendant's remedy is to seek to set aside the count(s) charged in this manner. West Cal. Ann. Penal Code § 995 (1985).

⁶West Cal. Ann. Penal Code § 995, subdivision (a)(2) (1985) provides, "[s]ubject to subdivision (b) of Section 995a, the indictment or information shall be set aside by the court in which the defendant is arraigned, upon his or her motion, in either of the following cases: [¶] If it is an information: (A) That before the filing thereof the defendant had not been legally committed by a magistrate. (B) That the defendant had been committed without reasonable or probable cause."

Petitioner appealed to the Fourth District Court of Appeal, Division Three. In a published opinion, *People v. Greenwood*, 182 Cal. App. 3d 729, 227 Cal.Rptr. 539 (1986), the court concluded that *People v. Krivda*, 5 Cal. 3d 357, 96 Cal.Rptr. 62, 486 P.2d 1262 (1971), (*Krivda I*) cert. grtd. and remanded *California v. Krivda*, 409 U.S. 33 (1972), and *People v. Krivda*, 8 Cal. 3d 623, 105 Cal.Rptr. 521, 504 P.2d 457 (1973) (*Krivda II*), cert. den., *California v. Krivda*, 412 U.S. 919 (1973), compelled suppression of evidence obtained from a warrantless, non-exigent seizure of a trash bag and its contents. The California Supreme Court denied petitioner's application for review.

SUMMARY OF ARGUMENT

This Court has repeatedly,

“ ‘emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes,’ *United States v. Jeffers*, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by the judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357 (1967), footnotes omitted.

Unquestionably, when police, individually or through the employment of an agent, break the seal on a closed, opaque container to observe and seize its contents, both a search and seizure occurs within the meaning of the Fourth Amendment. As Justice Stevens pointed out in *United States v. Jacobsen*, 466 U.S. 109, 114 (1984),

“[l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable.”

The issue before the Court is to what extent Billy Greenwood possessed and is permitted to possess a reasonable and legitimate expectation of privacy in the closed, opaque container he left for the garbage man to transport to a county owned and operated landfill for disposal. If his expectation of privacy receives the Court's stamp of approval, then the warrantless and unsupported search and seizure of the bag and its contents was unreasonable and subject to suppression. If not, its contents, and the road maps of all citizens it contains will be forever open to the capricious actions of the police and our various governmental agencies, restrained only by the size of their budgets, their sense of morality and the degree of their curiosity.⁷

Privacy in a free society is perhaps the cornerstone of what separates Americans from those totalitarian states we collectively abhor. As Walter Cronkite commented in his introduction to George Orwell's 1983 edition of *1984*,

“*1984* is an anguished lament and a warning that we may not be strong enough or wise enough nor moral enough to cope with the kind of power we have learned to amass. That warning vibrates powerfully when we

⁷A sign of this fear, whether real or imagined, invaded the decision of the Alaska Supreme Court when the court determined that under some circumstances police could conduct warrantless and unsupported trash searches. As the majority concluded, “we are unwilling to announce a general rule sanctioning official gathering and analysis of an individual's refuse.” *Smith v. State*, 510 P. 2d 793, 795 (Alas. 1973), cert. den. *Smith v. Alaska*, 414 U.S. 1086 (1973).

allow ourselves to sit still and think carefully about orbiting satellites that can read the license plates in a parking lot and computers that can tap into thousands of telephone calls and telex transmissions at once and other computers that can do our banking and purchasing, can watch the house and tell a monitoring station what television program we are watching and how many people there are in the room.”

No one questions that the refuse of our lives, whether labelled trash or garbage,⁸ is the road map of our existence. Anthropologists daily explore the very trash heaps of societies long-ago made extinct utilizing their waste as a window into their sophistication, morality and daily rituals. As the California Supreme Court reiterated in *People v. Krivda*, *supra*, 5 Cal. 3d 357, 366,

“[w]e can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse and trash to be examined by neighbors or others, at least not until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere. Half truths leading to rumor and gossip may readily flow from an attempt to ‘read’ the contents of another’s trash.” See also *People v. Edwards*, 71 Cal. 2d 1096, 1104, 80 Cal.Rptr. 633, 458 P.2d 713 (1969).

It is privacy, not the receptacle, which must be protected by this Court by acknowledging that society should

⁸For purposes of analyzing whether “trash” is constitutionally protected, it is unfortunate the “package” is so labelled bringing with it the connotations associated with scavengers, rodents and bag ladies sifting through banana peels and used dinner napkins. Included within the bag are also letters from children at college divulging their indiscretions, our financial records, our discarded drug prescriptions and innermost family secrets.

expand rather than contract the available venues within which privacy in a crowded and electronically invaded nation may be protected. As Judge Motley so correctly pointed out,

“[t]he concept of privacy is paramount in deciding a claimant’s standing to invoke the protection of the Fourth Amendment. Courts should be hesitant to narrow that concept because, in this society, the sphere of personal privacy has become more and more confined. In a real sense, if courts begrudge the scope of the privacy expectations of the populace, not only will there be less freedom of the person, but his or her expectations of freedom will wither and with them the values of individuality and privacy from increasingly intrusive government control.” *United States v. Kahan*, 350 F. Supp. 784, 793-794 (S.D.N.Y. 1972), *aff’d* in part 415 U.S. 239 (1974).

Whether the Court analyzes the issue presented in terms of the law of property or the oft-referenced test interpreted by Justice Harlan in *Katz*, it still remains for this Court to make a value judgment regarding where a homeowner/citizen’s right to keep his life private ends and the government’s right to intrude begins.⁹ It is not enough to say that if a citizen wants privacy in his refuse, he must do *something more* than merely locking it in a

⁹Professor LaFave suggests in this treatise the analysis the Court engages in in most respects is a mere tautology; the Fourth Amendment protects those interests that may justifiably claim Fourth Amendment protection. 1 W. LaFave, *Search and Seizure* 2d § 2.1 (1978). In short, the Court engages in a weighing process pitting a determination of what deserves protection from government intrusion in addition to the degree of freedom lost (cost) versus the need for effective law enforcement (effect). To that extent, some compromise may be necessary to balance the interests of the citizen and the State. See Issue III, *ante*.

closed, opaque container.¹⁰ *United States v. Terry, supra*, 702 F.2d 299, 309. As Chief Justice Burger pointed out, in general,

“[b]y placing personal effects inside a double-locked footlocker, respondents manifested an expectation of privacy that the *contents* would remain free from public examination.” *United States v. Chadwick*, 433 U.S. 1, 11 (1977), emphasis added.

Surely it is not the container or the means of closure which separates Billy Greenwood from Chadwick.

Our society, with ever-increasing density, electronic sophistication, justified paranoia and very real threats brought on by drugs and disease, still looks to the Constitution to protect the very liberties threatened by these developments and their cures. A momentary perusal of current literature demonstrates that the topic of drug testing in the work place and electronic eavesdropping offer both solutions to these problems and potential infringement of individual liberty. The issue the Court must now determine is whether the benefits of permitting wholesale

¹⁰Courts have found various excuses for denying the obvious; closed, opaque containers *do not* expose their contents to the world. Thus *United States v. Biodich*, 652 F.2d 743, 745 (8th Cir. 1981); *United States v. Crowell*, 586 F.2d 1020, 1025 (9th Cir. 1978); and *United States v. Vahalik*, 606 F.2d 99, 101 (5th Cir. 1979) each predicated their respective decisions upon the failure of the defendant to make special arrangements with the garbage men (what could they have done?). Similarly *United States v. Terry*, 702 F.2d 299, 309 (2nd Cir. 1983) suggested a defendant shred or burn his trash or personally deliver refuse to a garbage grinding machine. Unfortunately, the thought of every citizen possessing a shredder large enough to consume a weekly household of trash, violating local ordinances by transporting their own trash or worse yet burning it (the Air Quality Maintenance District of Los Angeles and the Environmental Protection Agency notwithstanding) is no answer to privacy interests.

searches of our nation's trash are justified by the loss of those protections. Further, if law enforcement is to be permitted to search trash unencumbered by a search warrant, should some restraint be placed upon the exercise of that right?

ARGUMENT

I

THE MERE FACT AN INDIVIDUAL PLACES TRASH AT CURBSIDE FOR PICK-UP DOES NOT DETERMINE HIS REASONABLE EXPECTATION OF PRIVACY UNDER THE FOURTH AMENDMENT.

A. Property Law Concepts Are Irrelevant For Determining A Defendant's Reasonable And Legitimate Expectation Of Privacy.

While a number of state courts and federal circuits have concluded that the only analysis necessary in determining whether a defendant has a legitimate expectation of privacy is to conclude garbage is abandoned property,¹¹

¹¹*United States v. Dzialak*, 441 F.2d 212, 215 (2nd Cir. 1971); *United States v. Reicherter*, 647 F.2d 397, 399 (3rd Cir. 1981); *United States v. Minker*, 312 F.2d 632, 634-635 (3rd Cir. 1963); *United States v. Mustone*, 469 F.2d 970, 972 (5th Cir. 1972); *Magda v. Bensen*, 536 F.2d 111, 112 (6th Cir. 1976); *United States v. Shelby*, 573 F.2d 971, 973 (7th Cir. 1978); *United States v. Burnette*, 698 F.2d 1038, 1047 (9th Cir. 1983); *United States v. Dela Espriella*, 781 F.2d 1432, 1437 (9th Cir. 1986); *United States v. Crowell*, *supra*, 586 F.2d 1020, 1025; *United States v. Terry*, *supra*, 702 F.2d 299, 309; *People v. Huddleston*, 38 Ill. App. 3d 277, 347 N.E.2d 76, 80 (1976); *Smith v. State*, *supra*, 510 P.2d 793, 795; *State v. Brown*, 20 Ohio App. 3d 36, 484 N.E.2d 215, 218 (1984); *State v. Purvis*, 249 Or. 404, 438 P.2d 1002, 1005 (1968); *State v. Schultz*, 388 So.2d 1326, 1330 (Fla. App. 1980); *State v. Stevens*, 123 Wisc.2d 303, 367 N.W.2d 788 (1985).

property law concepts such as abandonment play little or no role in the privacy decision. Beginning with the Court's decision in *Katz v. United States*, *supra*, 389 U.S. 347 the Court made it clear that,

“the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations]. But, what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” *Id.*, at 351-352.

Although the Court had earlier suggested abandonment was sufficient to negate a reasonable expectation of privacy, *Abel v. United States*, 362 U.S. 217, 239 (1960), later in *Oliver v. United States*, 466 U.S. 170 (1984), the Court again rejected the notion that the touchstone of the Fourth Amendment is a defendant's property rights.

“The existence of a property right is but one element in determining whether expectations of privacy are legitimate. ‘“The premise that property interests control the right of Government to search and seize has been discredited.” ’ ’. *Id.* at 183.

For those very reasons the dissent in *California v. Rooney*, — U.S. —, 107 S.Ct. 2852, 2858-2859, 97 L.Ed. 2d 258 (1987) recognized that property interests do not control Fourth Amendment analysis, even where the property is garbage. See also *United States v. Dunn*, — U.S. —, 107 S.Ct. 1134, 94 L.Ed. 2d 326 (1987); *California v. Ciraolo*, 476 U.S. —, 106 S.Ct. 1809 90 L.Ed. 2d 210 (1986).

B. The Use Of Property Law Concepts To Resolve Whether An Individual Has A Legitimate Expectation Of Privacy Fails To Account For Changes In Technology And Personal Values.

It is far too simplistic to label as abandoned property an individual's decision to place his life's possessions in a pail or bag at curbside for collection and end the inquiry. This is because courts seem far too quick to define abandonment in property law terms; i.e., "the intention to [permanently] retain" an interest in the object. *United States v. Burnett, supra*, 698 U.S. 1038, 1047. If the Court were to adopt such a simplistic approach, the problems would be manifold.

Individuals permanently and without reservation provide numerous tangible and intangible items to third persons and yet retain and have a legitimate expectation of privacy in them once they leave their possession. Although this Court has sanctioned the warrantless use of pen registers, *Smith v. Maryland*, 442 U.S. 735 (1979), *Katz* sanctifies the words which leave our mouths and are conveyed to a third party (the telephone company) for transmission to a receiver.¹² Similarly, the Court has sanc-

¹²The problems inherent in the Court's erosion of what is a legitimate expectation of privacy best come into play in *Katz*. When *Katz* was decided in 1967, few would have anticipated the widespread use of cordless telephones which permit home eavesdropping, intentionally or unintentionally, by neighbors and the police. Similarly, the advent of portable cellular telephones will soon open the door to Dick Tracy-like wrist telephones expanding the horizons of those interested in our conversations. Finally, telephone companies increasingly send our conversations and electronically transmitted documents via satellite, a form of transport open to interception by anyone with a twelve foot dish in their backyard. In short, as society becomes more sophisticated, privacy as defined by the Court becomes a scarcer commodity.

tioned a privacy interest in mail which every day is conveyed to both governmental and private entities for delivery to receivers. *United States v. Jacobsen, supra*, 466 U.S. 109; *United States v. Van Leeuwen*, 397 U.S. 249 (1970); *Ex Parte Jackson*, 96 U.S. 727 (1878).

It is for that very reason it is a mistake to attempt to draw a bright-line that all persons whose trash is left for collection lose a legitimate expectation of privacy based upon the property law concept of abandonment. This Court should reject a per se rule as was suggested by the Government recently in *United States v. Dunn, supra*, — U.S. —, 107 S.Ct. 1134, 1139, footnote 4, and the State of California herein. As the Court aptly pointed out when defining the concept of curtilage,

“[a]pplication of the Government’s ‘first fence rule’ might well lead to diminished Fourth Amendment protection in those cases where a structure lying outside a home’s enclosing fence was used for domestic activities.”

Similarly, a bright-line rule concluding all garbage left for collection is abandoned and thus outside the Fourth Amendment would diminish Constitutional protections where facts clearly indicate both a reasonably held and legitimate expectation of privacy.¹³ The Court should reject abandonment as the touchstone of garbage searches.

¹³Because *People v. Krivda, supra*, 8 Cal. 3d 623 compelled the court of appeal and the superior court to suppress the fruit of the trash search at issue here, no effort was made by either party to establish respondents’ reasonable expectation of privacy and society’s expectation trash left at curbside is protected.

C. Although The Great Weight Of Authority Finds Garbage Searches To Fall Outside The Fourth Amendment, They Uniformly Err In Basing Their Conclusion Upon Abandonment Principles.

As pointed out earlier at note 10, and repeatedly by petitioner and *amicus*, all federal circuits have concluded garbage left at curbside forfeits the depositor's reasonable expectation of privacy. But in all but a few of the decisions the result is a mere incantation of the apparent axiom; garbage is abandoned and abandoned property is unprotected by the Fourth Amendment.

It is this erroneous and facile reasoning the Court must avoid in formulating a standard by which to judge such searches. For although it *appears* that the weight of authority finds garbage searches to be outside the Fourth Amendment, such decisions were *uniformly* premised upon erroneous property law concepts condemned and discarded by this Court.

II

THE WARRANTLESS AND UNSUPPORTED SEARCH OF BILLY GREENWOOD'S GARBAGE VIOLATED DYANNE VAN HOUTEN'S REASONABLE AND LEGITIMATE EXPECTATION OF PRIVACY MANDATING SUPPRESSION OF THE FRUITS OF THAT SEARCH.

A. Billy Greenwood's Decision To Place His Trash At Curbside For Collection Met The Subjectivity Component Of Katz v. United States.

Katz v. United States, supra, imposes a two-part test for determining the protection afforded by the Fourth

Amendment. Justice Harlan, in interpreting the majority opinion defined the test as,

“first that a person have exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as ‘reasonable.’ ” *Id.*, at 361, (Harlan, J. concurring).

No court has defined what the subjective component in *Katz* is but rather have discussed it solely within the context of the specific facts of each case. Whether it refers to a defendant’s *actual* expectation of privacy or whether the court looks to the facts to determine whether the dweller *exhibited* an expectation of privacy,¹⁴ the facts here point to an expectation of privacy by Billy Greenwood.¹⁵ Stronger than in *Rooney* where the dissent “assumed [] under state law [Rooney] retained an ownership or possessory interest in the trash bag and its contents,”¹⁶ the trash bag here was in an individual bag, de-

¹⁴See Note, 60 N.Y.U.L. Rev. 725, 743-744 (1985).

¹⁵Petitioner no longer argues respondent Van Houten lacked standing to object to the search of Greenwood’s residence or trash and thus has waived the issue before the Court. Rules of the U.S. Supreme Court, Rule 21.

¹⁶*California v. Rooney, supra*, — U.S. —, —, 107 S.Ct. 2852, 2858, 97 L.Ed.2d 258 (White, dissenting). Under *In re Lance W.*, 37 Cal.3d 873 (1985) the California Supreme Court concluded Article I, § 28, subdivision (d) of the California Constitution merely eliminated from independent state grounds the judicial remedy of suppression where a protected interest came in conflict with a decision of this Court. Thus, *Krivda’s* conclusion trash left at curbside is protected under the California equivalent of the Fourth Amendment still controls the privacy interest exhibited by defendant. See *Amicus Los Angeles Public Defender*.

posited in an individual homeowner's trash pail for which only Billy Greenwood had an interest.¹⁷

As to the first portion of the *Katz test*, even courts which have concluded the subjective expectation of privacy in trash is not reasonable (legitimate) have conceded that one may maintain such an expectation in garbage left for collection. In denying suppression of the fruits of a warrantless trash search, the Minnesota Supreme Court nevertheless conceded,

“a householder may ordinarily have some expectation of privacy in the items he places in his garbage can.” *State v. Oquist*, 327 N.W.2d 587, 591 (Minn. 1982).

As to courts which reject any such possibility, their reasoning, like those decisions which without more found trash abandoned and unprotected, is both simplistic in their assumptions and flawed in their analysis. Thus, the court in *United States v. Terry, supra*, 702 F.2d 299, having noted the trash search involved a “green bag closed with a brown tape” left on the sidewalk, concluded without evidence,

“mere use of taped opaque containers as indicating an intent to retain a privacy interest . . . are obviously designed to assure tidiness in appearance rather than privacy.” *Id.*, at 309.

¹⁷There is no evidence in the record, one way or the other, whether Greenwood personally or subjectively harbored an expectation of privacy. This is a consequence of respondents' and petitioner's reliance upon the absolute rule of *Krivda* which provided respondents with a reasonable and legitimate expectation of privacy as a matter of law.

Or as the court concluded in *United States v. Reichert*, *supra*, 647 F.2d 397, 399,

“it is inconceivable that the defendant intended to retain a privacy interest in the discarded objects.”

Such assumptions, though perhaps indicative of the court's personal views, do injustice to an individual's right to “seek to preserve as private” his possessions and beliefs.¹⁸

Here, all the Court knows is that Billy Greenwood, to exhibit an expectation of privacy did everything short of placing a label on the container or bag, or placing a sign on his lawn, strictly prohibiting garbage men or scavengers from opening the containers. The bags were opaque and sealed at the top, leaving nothing visible to the onlooker. Nothing suggested an intention to do anything more than convey the item to the garbage man for one purpose: for transportation to a hole in the ground where a bulldozer would bury it for antiquity.¹⁹ If a home owner may have an expectation of privacy in his trash left at curbside, Billy Greenwood did everything necessary to manifest his intent that the contents of the bag remain private.

¹⁸The Court made a similar assumption in doubting that “people in general entertain any actual expectation of privacy in the numbers they dial.” *Smith v. Maryland*, *supra*, 442 U.S. 735, 742. The difficulty confronting individuals in determining what the Fourth Amendment protects is the apparent need to determine what society is willing to or believes should be protected, a form of “constitutional rights” by opinion poll.

¹⁹If there is any doubt as to respondent's subjective expectation of privacy, he should be permitted on remand to make the requisite showing.

B. Possession Of An Expectation Of Privacy In Garbage Left For Collection Is Both Reasonable And Legitimate.

The societal necessity of turning over refuse to garbage collectors for disposal is not one merely engaged in out of volunteerism or a higher moral sense of ecology. In Orange County, California, and particularly in Laguna Beach where respondent Greenwood resided, the options of burying or burning refuse are equally unlawful. Orange County Municipal Code § 4-3-45, subdivision (a) commands that,

“solid waste created, produced, or accumulated in or about an apartment house, a dwelling house, or other place of human habitation shall be removed from the premises at least once each week.”

Further, any residential burning of trash is strictly banned in Orange County Municipal Code § 3-3-85. In sum, the act of delivering trash to third persons is compelled through use of a governmental, penal statute. If that is the case, the real question then should be whether in accomplishing that act the house dweller *exhibits* an expectation the contents *will not* be exposed to the eyes of the world. Placing the trash in a closed, opaque container does just that.

In concluding that Rooney failed to establish a legitimate expectation of privacy, the dissent argued two salient facts: trash is delivered to third parties and that it is foreseeable that police would search trash bags. Since

delivery to third persons is legally compelled, the real issue posed by the dissent is foreseeability.²⁰

What the dissent meant by foreseeability is not entirely known. As is obvious, many actions of government may be foreseeable yet improper. The same reasoning would apply if police conducted daily check-points on the highways after supplying notice to the public in newspapers and magazines; yet the Court has held such spot checks violative of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648 (1979). Certainly Pacific Bell's warning to customers that their cellular telephone conversations may not be private does not, for Fourth Amendment purposes, diminish the expectation of privacy in the telephone call predicated upon *Katz*.

A home dweller's garbage deserves protection. *Oliver v. United States*, *supra*, 466 U.S. 170; 1 W. LaFave, Search

²⁰Although *Katz* appears to protect the sanctity of telephone conversations based upon society's belief such communications are due protection, under the *Rooney* dissent one must question the reasonableness of even telephone conversations when Pacific Bell now warns its customers in each billing that, "[i]t is a crime under state and federal law to eavesdrop on telephone conversations. Normally, you don't have to worry about the privacy of conversations you have on telephones located in your home or business. However, if you make calls using a cellular telephone or receive calls from people who do, you need to be aware that your conversations on these phones may not be entirely private . . . [¶] For this reason, the California Public Utilities Commission (CPUC) has asked that those placing calls on cellular telephones advise the people they are calling about the privacy issue at the beginning of each conversation. The CPUC also asked us to inform you that there are 'scrambling' devices for cellular phones" Presumably, the same warning should apply to cordless telephones widely utilized in residences and businesses.

and Seizure 2d 2.1(d) (1978). This Court has long recognized.

“ ‘the security of one’s privacy against arbitrary intrusion by the police’ is ‘at the core of the Fourth Amendment.’ E.g., *Berger v. New York*, 338 U.S. 41, 53; *Schmerber v. California*, 384 U.S. 757, 767; *Wolf v. Colorado*, 338 U.S. 25, 27 [overruled on another point in *Mapp v. Ohio*, *supra*, 367 U.S. 643].)” *People v. Edwards*, *supra*, 71 Cal 2d 1096, 1103.

It is this fundamental privacy interest which the Court must protect.²¹ *People v. Whotte*, 113 Mich. App. 12, 317 N.W.2d 266, 269 (1982) (Burns, J. dissenting).

It is the denigration of privacy interests which is represented by those decisions which find an expectation of privacy illegitimate. Thus decisions such as *State v. Oquist*, *supra*, 327 N.W.2d 587 find no legitimate expectation of privacy absent any attempt at analyzing societal privacy needs. See also *United States v. Sumpter*, 669 F.2d 1215 (8th Cir. 1982). Similarly, decisions exemplified by *United States v. Biondich*, *supra*, 652 F.2d 743 premise the expectation of privacy issue on whether the defendant made “special arrangements with the garbage collector,” *id.*, at 745, or sought to burn, shred or bury the trash. *United States v. Terry*, *supra*, 702 F.2d 299; *United States v. Crowell*, *supra*, 586 F.2d 1020.

²¹The Court noted in *United States v. Dunn*, *supra*, — U.S. —, 107 S.Ct. 1134, that the curtilage focus for Fourth Amendment purposes is upon “whether the area harbors the ‘intimate activity associated with the “sanctity of a man’s home and the privacies of life.”’ ” *Id.*, at 1139. Surely an individual’s refuse is at the core of everything man does; from what he reads (ideas) to what he writes (thoughts).

That is not to say the issue of the legitimacy of privacy in refuse hasn't been analyzed. Obviously thrice the California Supreme Court has examined the question and concluded that a householder has a legitimate expectation of privacy in trash left at curbside. *People v. Krivda, supra*, 5 Cal. 3d 357, (*Krivda I*) cert. grtd. and remanded *California v. Krivda, supra*, 409 U.S. 33, and *People v. Krivda, supra*, 8 Cal. 3d 623 (*Krivda II*), cert. den., *California v. Krivda, supra*, 412 U.S. 919; *People v. Edwards, supra*, 71 Cal. 2d 1096. In addition, the state of Hawaii and the Federal District Court, Southern District of New York supplemented by thoughtful dissents in Illinois,²² Michigan,²³ Alaska,²⁴ Florida and Wisconsin support the proposition that privacy in a householder's trash should and must be protected.²⁵

In *State v. Tanaka*, 701 P.2d 1274 (Hawaii 1985) the Hawaii Supreme Court found that not only did the defen-

²²*People v. Huddleston, supra*, 38 Ill.App. 3d 277, 347 N.E. 2d 76 (Stouder, J., dissenting).

²³In *People v. Whotte, supra*, 317 N.W.2d 266, Michigan adopted the multiphasic test proposed by the Alaska Supreme Court in *Smith v. State*. See n. 24, ante. Justice Burns dissented arguing the rule adopted by the majority effectively infringed upon the fundamental privacy interests of the individual.

²⁴*Smith v. State, supra*, 510 P.2d 793 (Rabinowitz, J. dissenting). The majority announced a four part test for determining the legitimacy of a house dweller's expectation of privacy (location of trash, numbers of residential units, who removed the trash, and where it was searched), but concluded *Smith* failed to meet the test.

²⁵The Supreme Judicial Court of Maine in passing upon a trash search occurring after a barrel was removed from the defendant's garage concluded that placing the contraband in the barrel did not constitute an abandonment within the meaning of *Abel v. United States, supra*, 362 U.S. 217. *State v. Chapman*, 250 A.2d 203 (Sup.Jud.Ct.Me. 1969), overruled *State v. Johnson*, 413 A.2d 931 (1980).

dant have an "actual expectation of privacy [] by the placing of the item in an opaque, closed container," *id.*, at 1276, but that under the doctrine of independent state grounds Hawaii would recognize the legitimacy of that expectation. Similarly, Judge Motley in *United States v. Kahan, supra*, 350 F.Supp. 784 analogized the act of placing refuse in the hands of garbage men for transportation to a disposal site to both throwing the refuse into a shredder or more appropriately, handing a letter to a mail carrier. In both cases, what prevents government intrusion is not the shape or character of the container, but the expectation by society that placing the items contained therein in a closed container maintains the privacy the owner has reasonably come to expect.²⁶

Judge Anstead, dissenting in *State v. Schultz, supra*, 388 So.2d 1326 observed,

"[i]n my view, a homeowner, upon placing items in a closed garbage container and placing the container in a position on his property where the container can be conveniently removed by authorized trash collectors, is entitled to reasonably expect that the container and the trash therein will be removed from his property only by those authorized to do so, and that such trash will be disposed of in a manner provided by ordinance or private contract. By sealing the containers in a secure manner and placing the containers on his own property, the owner has done everything within his own means to insure the privacy of the contents thereof, short of delivering the containers to a central disposal site himself." *Id.*, at 1330.

²⁶In a 4-3 decision of the Wisconsin Supreme Court, Justice Heffernan dissented noting that "all [the defendant] did [was] expose closed bags of garbage" rather than their contents to public scrutiny. *State v. Stevens, supra*, 123 Wisc.2d 303, 367 N.W.2d 788 (Heffernan, J., dissenting).

In disposing of the argument that trash is open to the prying eyes of anyone; be it man, woman or animal, who chooses to sift through the refuse, Judge Anstead chided,

“[w]hile it is true that one cannot reasonably expect trash containers to be completely safe from probing dogs . . . common sense tells us that one should be able to expect that his property and the trash containers will be free from search and seizure by the police, neighbors and others who are and should be more knowledgeable and respectful of the property and the privacy rights of others.” *IBID.*

In sum, contrary to petitioner's assertions, those courts which have sought to determine the legitimacy of a householder's expectation of privacy in trash containers are neither unanimous nor necessarily foolhardy. They merely recognize that in a society which is slowly losing its ability to retain its thoughts, ideas, fears, and concerns private from the world, the courts should collectively recognize that our garbage is merely a conduit for burying the products of our individual lives. As Justice Rabinowitz noted,

“a free and open society cannot exist without the right of the people to be immune from unreasonable interference by representatives of government. In order to preserve and protect this right of privacy, our Founding Fathers promulgated the fourth amendment to the United States Constitution. As the United States Supreme Court has repeatedly observed: [¶] The basic purpose of the Fourth Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.” *Smith v. State, supra*, 510 P.2d at 799, footnote omitted.

Finding an expectation of privacy in a householder's trash to be both reasonable and legitimate is one means by which

this Court may protect we as individuals and as a society from inroads of government intrusion.

III

THE COURT MUST AT THE VERY LEAST ADOPT A RULE REQUIRING THE POLICE HAVE PROBABLE CAUSE PRIOR TO CONDUCTING WARRANTLESS SEARCHES OF TRASH LEFT AT CURBSIDE.

A. United States v. Ross Establishes A Middle Ground Where An Individual Has A Legitimate But Lowered Expectation Of Privacy.

In *United States v. Ross*, 456 U.S. 798 (1982) the Court broke ground with a series of decisions which limited law enforcement's ability to conduct warrantless automobile searches. See gen. *Robbins v. California*, 453 U.S. 420 (1981); *United States v. Chadwick*, *supra*, 433 U.S. 1; *Arkansas v. Sanders*, 442 U.S. 753 (1979). In examining the right to search where police have legitimately stopped an automobile and possess probable cause to believe the auto contains contraband, Justice Stevens writing for the Court concluded that police,

"may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant. . . ." *Id.*, at 800.

The holding, considerably more expansive in the degree to which police could open closed containers found within automobiles, appeared to be based upon the belief individuals already possessed a lower expectation of privacy in automobiles than in their homes. Thus the Court relied on *Carroll v. United States*, 267 U.S. 132 (1925) and noted that,

“individuals always had been on notice that moveable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate’s prior evaluation of those facts.” *United States v. Ross*, *supra*, at 806, n. 8.

In sum, where an individual has a legitimate but lowered expectation of privacy in an object easily moveable, the Court has found a middle ground requiring police to be armed with probable cause but foregoing the requirement such cause first be tested by a neutral magistrate.²⁷

B. The Court Should Adopt A Rule Governing Trash Searches That Where An Individual Has Exhibited A Reasonable Expectation Of Privacy In Trash, Police May Conduct Warrantless Searches Only Upon Probable Cause.

Admittedly trash left at curbside is, like an automobile, highly mobile. *Carroll v. United States*, *supra*. Assuming arguendo the Court is disinclined to provide full Fourth Amendment protection to a homeowner’s trash left at curbside, the Court should adopt a rule, similar to that in *Ross*, holding that where an individual has exhibited a reasonable expectation of privacy in trash left at curbside, police

²⁷In *South Dakota v. Opperman*, 428 U.S. 364, 367-368 (1976), the Court in examining warrantless inventory searches, concluded that an individual’s, “expectation of privacy with respect to one’s automobile is significantly less than that relating to one’s home or office.” This resulted from (1) the mobility of the vehicle and the individual’s reasonable expectations. However, rather than follow a number of lower courts which had either concluded inventory searches did not fall within the protection of the Fourth Amendment or were not searches at all, the Court found a middle ground concluding *warrantless* searches following a valid seizure were reasonable.

may conduct warrantless searches only upon probable cause. Such a rule would benefit both law enforcement with minimal societal cost while at the same time preserving an individual's reasonable and legitimate privacy interest.

Clearly, whatever the level or degree of privacy interest an individual has in trash left at curbside, it is not identical to that experienced in the home. This is based upon the fact that trash is open to scavengers (to whatever minimal degree in fact such behavior occurs) and is placed in the custody of third persons.²⁸ It is the lowered yet legitimate expectation of privacy which would be protected by imposition of the *Ross* rule with regard to trash searches.

The requirement that law enforcement be possessed with probable cause prior to searching an individual's trash protects society against arbitrary and capricious searches by law enforcement. While not tested by a neutral magistrate prior to a search, the search is ultimately tested and thus checked by a court of law when the government seeks to utilize the fruits of the search at trial. Law enforcement is not unduly hindered since society has long accepted the cost of police action which must be predi-

²⁸In the case of the use of the mail or telephone calls, individuals assume and perhaps must hope that others will respect their privacy. Nothing guarantees that the mailman will not violate the law and open the envelope or not break the law and merely peer through it. Similarly, all an individual may do is rely upon an implied covenant with private carriers they will not break the package and inspect the contents. Finally, party lines and inadvertent radio interception of telephone calls regularly occur, yet individuals expect that once interception occurs, the intervening party will hang up.

cated on more than hunch and rumor. *Illinois v. Gates*, 462 U.S. 213 (1983); *Terry v. Ohio*, 392 U.S. 1 (1968).

In conclusion, the concerns of society would be protected from improper and capricious police actions while at the same time insuring law enforcement's ability to obtain evidence of criminal actions without the necessity of a warrant and the fear evidence of a crime would evaporate. As the Hawaii Supreme Court convincingly noted,

“[p]eople reasonably believe that police will not indiscriminately rummage through their trash bags to discover their personal effects. Business records, bills, correspondence, magazines, tax records and other tell-tale refuse can reveal much about a person's activities, associations and beliefs . . . [This] type of police surveillance . . . should not go unregulated, for a society in which all our citizens 'trash cans could be made subject of police inspection' for evidence of more intimate aspects of their personal life upon nothing more than a whim is not 'free and open.' ” *State v. Tanaka*, *supra*, 701 P.2d 1274, 1277, citing *W. LaFave, Searches and Seizures* § 2.6(c) at 378 (1978).

C. The Search Of Billy Greenwood's Trash Was Without Probable Cause Mandating The Quashing Of The Search Warrant For His Home.

Whether the search of Billy Greenwood's trash were conducted under the authority of a judicially issued search warrant, a judicially recognized exigency or under the proposed *United States v. Ross* rule, the search was unlawful. Under any interpretation of the facts, officer Stracner conducted the initial searches of respondent's trash based upon hunch, conjecture and the unsupported and uncorroborated information of an informant.

As the Court noted in *Illinois v. Gates, supra*, 462 U.S. 213, 239, the probable cause formula boils down to making,

“a practical, common-sense decision, whether, given all the circumstances set forth in the [search warrant] affidavit before [the magistrate], including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.”

Since the evidence before the Court establishes that officer Stracner acted solely upon an anonymous, untested tip and utilized the searches themselves to develop probable cause, the Court should find that the searches violated the Fourth Amendment and suppress the fruits discovered therein.

CONCLUSION

For the foregoing reasons the decision of the court of appeal should be affirmed.

Respectfully submitted,

RICHARD L. SCHWARTZBERG
(Counsel of Record)
401 Civic Center Drive West
Suite 820
Santa Ana, California 92701
714-835-3339

Counsel for Respondent
Dyanne Van Houten